

1 **WO**

2

3

4

5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Center for Biological Diversity et al.,

No. CV-15-00019-TUC-JGZ (l)

9 Plaintiffs,

No. CV-15-00179-TUC-JGZ (c)

10 v.

No. CV-15-00285-TUC-JGZ (c)

11 Ryan Zinke, et al.,

ORDER

12 Defendants.

13 _____
14 Safari Club International, et al.,

No. CV 16-00094-TUC-JGZ

15 Plaintiffs,

ORDER

16 v.

17 Ryan Zinke, et al.,

18 Defendants.

19 Pending before the Court is Federal Defendants' Motion to Modify Deadline for
20 Completion of Remand. (Doc. 267.)¹ Plaintiffs Center for Biological Diversity and
21 Defenders of Wildlife and Plaintiffs WildEarth Guardians, et al., filed responses.² (Docs.
22 268, 269.) Federal Defendants filed a combined reply. (Doc. 273.) After consideration of
23 the parties' briefing and the record, the Court will grant the Defendants' motion.

24
25
26 _____
27 ¹ The citations to the record in this order refer to case No. CV-15-00019-TUC-JGZ.

28 ² The Center for Biological Diversity and Defenders of Wildlife are Plaintiffs in
case No. CV-15-00019-TUC-JGZ. WildEarth Guardians, New Mexico Wilderness
Alliance, and Friends for Animals are Plaintiffs in case No. CV-15-00285-TUC-JGZ.

1 **I. Background**

2 In a March 31, 2018 Order, the Court found that Fish and Wildlife Service’s (FWS)
 3 2015 10(j) rule for the experimental population of the Mexican gray wolf was not
 4 compliant with the Endangered Species Act (ESA). (Doc. 200, p. 40.) The Court remanded
 5 the 2015 10(j) rule to FWS for further action consistent with the Court’s Order, and held
 6 that the existing 10(j) rule would remain in effect until a new final rule issued. (*Id.* at 43-
 7 44.) The Court further ordered that the parties provide a proposed deadline for the
 8 publication of a revised 10(j) rulemaking. (*Id.* at 44.)

9 On June 7, 2018, the Court ordered that, following the issuance of a final order on
 10 the request for interim injunctive relief and entry of final judgment, Federal Defendants
 11 shall have twenty-five months to issue a final, revised 10(j) rule. (Doc. 215, p. 2.) The
 12 Court denied injunctive relief on March 29, 2019, and, on April 17, 2019, the Court entered
 13 final judgment with a twenty-five-month remand deadline, requiring Defendants to file
 14 semi-annual reports. (Docs. 242, 244.)

15 In its first report filed in July 2019, FWS indicated that it had started the revision
 16 process and that it would develop an internal draft of the proposed 10(j) rule and associated
 17 NEPA analyses on schedule between June and November 2019. (Doc. 247.)

18 The December 2019 status report stated that FWS had developed a “working draft”
 19 while it continued “analyzing several specific issues.” (Doc. 261, p. 2.) The agency
 20 determined that a supplemental environmental impact statement (SEIS) would be
 21 necessary—a four-month process not accounted for in the twenty-five-month deadline.
 22 (*Id.*)

23 In its July 1, 2020 report, FWS stated that completion of the SEIS was necessary
 24 before proceeding further with the development of the proposed rule; FWS had published
 25 a Notice of Intent to develop a SEIS on April 15, 2020; FWS was waiting for the 60-day
 26 comment period to end. (Doc. 265, p. 2.) FWS further stated that delays were expected due
 27 to complications of the now present COVID-19 pandemic, including reduced staff hours,
 28 delays in internal processes and external communications with cooperating agencies, and

1 the redirecting of resources and staff labor towards developing a virtual forum for the
 2 public comment period. (*Id.* at 4-5.) FWS reported that it was working to publish a Notice
 3 of Availability of the proposed revised rule and a draft SEIS in the Federal Register by
 4 October 2020. (*Id.* at 4.) At this point, FWS was six months behind the original schedule.

5 In its January 2021 report, FWS stated it took the agency two months longer than
 6 anticipated to sort, review and synthesize comments on the Notice of Intent. (Doc. 266, p.
 7 2.) FWS produced a 60-plus page synthesis of public comments that it expected to
 8 incorporate into the Draft SEIS. (*Id.*) The FWS reported it had numerous Cooperating
 9 Agency meetings via video and teleconference and two Tribal Working group meetings.
 10 (*Id.* at 3.) FWS stated that the agency “is close to finalizing a proposed revised rule and
 11 continues to work with cooperating agencies on the draft SEIS, including the development
 12 of additional data.” (*Id.*) Based on the work remaining, the ongoing pandemic, and the
 13 anticipated significant public interest, FWS represented that it would likely not meet the
 14 May 2021 deadline. (*Id.* at 4.)

15 FWS subsequently sought Plaintiffs’ consent to extend the timeline. (Doc. 267-1, p.
 16 5.) The parties agree that an extension is warranted but disagree as to the extent of the
 17 extension. (*Id.*; Doc. 268, p. 2; Doc. 269, p. 2.)

18 In the pending motion, the Federal Defendants document the work remaining and seek
 19 to modify the deadline set forth in this Court’s judgment, pursuant to Federal Rule of Civil
 20 Procedure 60(b)(5) or (b)(6). (Doc. 267.) The Federal Defendants proposes a fourteen-
 21 month extension of the deadline. (*Id.* at 2.) The Plaintiffs, in opposition, argue that such
 22 an extension is excessive and unreasonable. (Doc. 268, p. 2; Doc. 269, p. 2.) Plaintiffs
 23 assert that a six-month extension is appropriate. (*Id.*)

24 **II. Standard for Modification of a Final Judgment**

25 Federal Rule of Civil Procedure 60(b)(5) provides: “On motion and just terms, the
 26 court may relieve a party or its legal representative from a final judgment . . . [if] applying
 27 it prospectively is no longer equitable.” The Ninth Circuit has held that the “general,
 28 flexible standard” set forth in *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992),

1 “applies to all Rule 60(b)(5) petitions brought on equitable grounds.” *Bellevue Manor*
 2 *Assocs. v. United States*, 165 F.3d 1249, 1255-57 (9th Cir. 1999); *Ctr. for Biological*
 3 *Diversity v. Norton*, 2003 WL 22225620, *1-2 (S.D. Cal. Sept. 9, 2003) (applying *Rufo*
 4 standard to modify deadline for FWS to issue a new proposed and final critical habitat
 5 determination). Under the flexible standard, “a party seeking modification of a [final
 6 judgment] bears the burden of establishing that a significant change in circumstances
 7 warrants revision of the [final judgment]. If the moving party meets this standard, the court
 8 should consider whether the proposed modification is suitably tailored to the changed
 9 circumstance.” *Rufo*, 502 U.S. at 383.

10 **III. Discussion**

11 **A. Modification is Warranted**

12 Modification of a final judgment “may be warranted when changed factual
 13 conditions make compliance with the decree substantially more onerous.” *Rufo*, 502 U.S.
 14 at 384. “Modification is also appropriate when a decree proves to be unworkable because
 15 of unforeseen obstacles.” *Id.* The parties do not dispute that the change in circumstances
 16 due to the COVID-19 pandemic makes the remand deadline unworkable and therefore
 17 agree that modification is warranted.

18 FWS documents the unforeseen complications due to the COVID-19 pandemic and
 19 its continuing impact on FWS’s compliance with the remand deadline initially presented
 20 to the Court in 2018. These complications include reduced staff hours, delays in internal
 21 processes, delays in communication with cooperating agencies, and the redirecting of
 22 resources and staff labor towards creating a virtual public comment forum. Further, FWS
 23 proposes extending the public comment period by 30 days in light of the logistical
 24 challenges presented by COVID-19 and the need for participation of its Cooperating
 25 Agencies and the public, cooperation which is crucial to wolf conservation and recovery
 26 actions. Based on these circumstances, the Court finds that modification of the remand
 27 deadline is appropriate.

28 The Court also finds that the need to develop a SEIS constitutes a changed factual

1 condition that makes compliance with the final judgment deadline substantially more
 2 onerous. *See Rufo*, 502 U.S. at 384. The development of a SEIS creates an additional four
 3 months of work. Although the potential need for a SEIS was foreseeable at the time the
 4 Court imposed its final judgment, the Court did not take it into account in setting the
 5 deadline. The Court declined to adopt an extended deadline to include time, should a SEIS
 6 be required. (Doc. 215, p. 2.)

7 Due to both of these changed circumstances, the Court concludes that equity
 8 requires that the final judgment be modified. *See Rufo*, 502 at 395 (O'Connor, J.,
 9 concurring) (noting that the court's holding provides that modification may be "equitable"
 10 under Rule 60(b)(5) even if the changed circumstance is foreseeable).³

11 **B. FWS's Proposed Modification is Suitably Tailored to the Changed
 12 Circumstances**

13 "Once a court has determined that changed circumstances warrant a modification in
 14 a [final judgment], the focus should be on whether the proposed modification is tailored to
 15 resolve the problems created by the change in circumstances." *Rufo*, 502 U.S. at 391.

16 FWS has provided evidence that the proposed fourteen-month extension is suitably
 17 tailored to resolve the change in circumstances. The declaration submitted by FWS details
 18 the work remaining and proposes timeframes for completion of each step in the rulemaking
 19 process in light of the COVID-19 pandemic. The proposed deadline is based on FWS's
 20 experience in developing rules, including those required by Section 10(j) of the ESA. *See*
 21 *Rufo*, 502 U.S. at 392, n.14 (noting that the district court should give "significant weight"
 22 to local government officials who must implement the modification); *see also Ctr. for*
 23 *Biological Diversity v. Norton*, 2003 WL 22225620, at *2 n.1 (S.D. Cal. Sept. 9, 2003)
 24 (interpreting *Rufo*'s deference to local government officials to include any government
 25 agency because the agency is "usually in a unique position to understand what its resource

26 ³ Because the Court finds that the changed factual circumstances warrant
 27 modification, the Court need not consider whether "enforcement of the [final judgment]
 28 without modification would be detrimental to the public interest." *Rufo*, 502 U.S. 384-85
 (noting that the detriment to the public interest is an alternative basis to warrant
 modification).

1 constraints are and how to allocate those resources”). Although the delay is regrettable, the
 2 Court concludes that FWS’s proposed modification is suitably tailored to the change in
 3 circumstances.⁴

4 Plaintiffs argue that FWS’s failure to meet the deadline is self-imposed because it
 5 took no action for over a year after the Court’s summary judgment order. Plaintiffs’
 6 arguments as to why the proposed deadline is excessive and unreasonable are
 7 understandable. However, the previous delay has no bearing on whether the proposed
 8 modification is tailored to the changed circumstances and current needs.

9 Plaintiffs also argue that fourteen months is unreasonable because “a reasonable
 10 time for an agency decision could encompass months, occasionally a year or two, but not
 11 several years or a decade.” *Midwest Gas Users Ass’n v. FERC*, 833 F.2d 341, 359 (D.C.
 12 Cir. 1987) (internal quotations and citation omitted). In *Midwest Gas*, the court stated,
 13 “whether a delay is unreasonable necessarily turns on the facts of each particular case.” *Id.*
 14 The facts here justify FWS’s proposed deadline.

15 The Court does not find that Plaintiffs’ proposed six-month extension is sufficient.
 16 It does not include time required to complete a SEIS and does not take into account the
 17 continuing delays expected with the COVID-19 pandemic. Although further delay does
 18 not advance the goals of protecting the Mexican gray wolf, the ESA requires FWS to
 19 comply with the rulemaking process. FWS has shown that the proposed extension is
 20 warranted in order to provide a rule that satisfies Section 10(j).

21 //
 22 //
 23 //
 24 //
 25 //
 26 //
 27 //

28 ⁴ Having found that modification is appropriate under Rule 60(b)(5), the Court will
 not consider whether modification is warranted under Rule 60(b)(6).

1 For the foregoing reasons,

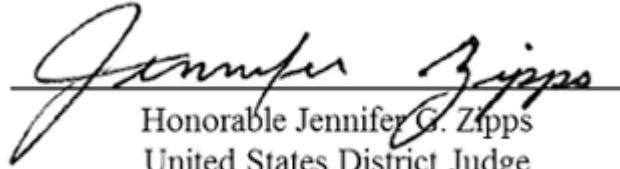
2 **IT IS ORDERED** that Federal Defendants' Motion to Modify Deadline for
3 Completion of Remand (Doc. 267) is **GRANTED**.

4 **IT IS FURTHER ORDERED** that the Court's Order (Doc. 215 in CV-15-00019-
5 TUC-JGZ and Doc. 106 in CV-16-00094-TUC-JGZ) and Final Judgment (Doc. 244 in CV-
6 15-00019-TUC-JGZ and Doc. 112 in CV-16-00094-TUC-JGZ) are **MODIFIED** as
7 follows: Federal Defendants shall have thirty-nine (39) months to issue a final, revised
8 10(j) rule in accordance with the Court's March 31, 2018 Order. Federal Defendants shall
9 issue the final rule on or before **July 1, 2022**.

10 All other provisions of the Court's orders and final judgments shall remain in full
11 force and effect, including that Federal Defendants shall submit semi-annual reports
12 informing the Court and all parties of their progress towards finalizing a revised 10(j) rule.

13 Dated this 27th day of April, 2021.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Honorable Jennifer G. Zipts
United States District Judge